**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**
**CIVIL APPELLATE JURISDICTION**

SECOND APPEAL NO.144 OF 2006

Sadashiv Ramchandra Bangane .. Appellant.
Vs.
Bhagirathi Shankar Chaugule .. Respondent.

Mr.Uday Warunjikar for the appellant.
Mr.S.M.Kamble i/b Mr.Ganesh Gole for the respondent.

**CORAM : D.B.BHOSALE, J.**

**DATED : 6TH MARCH, 2007**

P.C.:

. Heard learned counsel for the parties.

2. This appeal is directed against the concurrent judgments of the courts below by which a suit filed by the respondent-plaintiffs for partition and separate possession of their share in the ancestral properties stands decreed. The trial Court granted 1/6th share each to the plaintiffs, which the appeal court in the appeal filed by the appellant-defendant enhanced it to 1/3rd share each to the plaintiffs and the defendant. Mr.Warunjikar, learned counsel for the appellant raised ground nos.A, B and C, in the memo of appeal, as the substantial questions of law in the present appeal. Ground nos.(A), (B) and (C) read thus:

> "A. In absence of the Appeal on behalf of the original plaintiff or counter claim or

cross objection on behalf of the original plaintiff whether the lower appellate Court was justified in enhancing the share of the original plaintiff from 1/6th each to 1/3rd each in property no.1A.

B. Whether the Lower Appellate Court has any power to enhance share of the party who has not preferred appeal nor it is argued nor any notice is given to other party.

C. Whether the Lower Appellate Court has justified in enhancing share of the Respondent without giving any opportunity of being heard to the present Appellant, who is Applicant before the Lower Appellate Court."

3. Mr.Warunjikar did not raise any other question of law for my consideration nor did he submit that the shares determined by the appellate court are wrong. He submitted that the appeal court could not have enhanced the share of the plaintiffs from 1/6th, granted by the trial Court, to 1/3rd when admittedly, the respondent-plaintiffs had not filed either appeal or counter claim or cross objections. This is against the settled procedure which the appellate court ought to have followed. He further submitted, the appellate court had no power to enhance the shares without giving an opportunity of being heard to the appellant. I repeatedly asked Mr.Warunjikar to address on merits and satisfy as to how the appellate court was wrong in law in granting 1/3rd share each to the plaintiffs and the defendant, but he did not address on this point and kept repeating that the aforesaid grounds being

substantial questions of law, I should admit the appeal.

4. The respondent-plaintiffs are daughters of one Ramchandra from his first wife - Akkatai whereas the defendant is the son of Ramchandra from his second wife - Shevanta. Ramchandra died on 2.6.1998 and since the plaintiffs were refused their share they filed the present suit for partition and their separate share in the property of Ramchandra.

5. The provisions contained in Rule 4 and 33 of Order 41 of the Code of Civil Procedure (for short "CPC") will have to be looked into to deal with the submissions of Mr.Warunjikar, learned counsel for the appellant. Rule 33 is divided in three parts. The first part confers on the appellate Court very wide powers to pass such orders in the appeal as the case may require. The second part contemplates that this wide power will be exercised by the appellate court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection. The third part is where there have been decrees in cross suits or where two or more decrees are passed in one suit, this power is directed to be

exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees. The present case, in my opinion, falls within the second part of rule 33 of Order 41 of the CPC. The powers conferred under this provision undoubtedly can be exercised by the appellate court, more particularly when the court below has committed an error of law, to correct such error or in law the order is not sustainable, as it happened in the present case. The order granting only 1/6th share to the plaintiffs in the present case was found to be ex-facie illegal. The argument of Mr.Warunjikar that the appellate could not have varied the judgment of the trial Court against the defendants without their being an appeal or cross objections filed by the plaintiff has, therefore, no merit.

6. That apart, it is well settled that in a suit for partition, plaintiff and defendant are parties of equal status. If the right of partition has been recognised and upheld by the court, merely because only the defendant had appealed and not the plaintiff, the court was not powerless. It could invoke provisions of Order 41, Rule 4 read with Order 41, Rule 33 of CPC. The object is to enable one of the parties to a suit to obtain relief in appeal when the decree appealed from proceeds on a ground common to

him and others. The court in such an appeal may reverse or vary the decree in favour of all the parties who are in the same interest as the appellant. This is settled by the Supreme Court in **Chandramohan Ramchandra Patil Vs. Bapu Koyappa Patil AIR 2003 Supreme Court 1754**. The appellate court has, therefore, rightly varied the judgment of the trial Court having found it to be not sustainable in law. The shares determined by the trial Court were found to be ex-facie illegal and, therefore, the appeal court seems to have varied the shares in accordance with the provisions of Hindu Succession Act. Insofar as allotment of the shares, to the extent of 1/3rd each to the plaintiff and the defendant, is concerned, it was not challenged at all on any ground whatsoever. In the circumstances this appeal deserves to be dismissed. Order accordingly.

**(D.B.Bhosale, J.)**